JUDICIAL DECISIONS ON CRIMINAL LAW AND PROCEDURE

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JURISDICTION, Q. S.

Commonwealth v. Kaiser, 24 D. R. (Pa.) 74. *Bigamy—Power to Declare Bigamous Marriage Void as Incident of Sentence* (Act of March 27, 1903).

"The conviction of a defendant of bigamy under the Act of March 27, 1903, P. L. 102, establishes the fact of the bigamous marriage, and the Court of Quarter Sessions in imposing sentence on the defendant may, as an incident to the sentence, declare the bigamous marriage null and void.

"It is not the decree that renders the marriage a nullity. The Act of Assembly itself declares that the marriage shall be void. The only function of the decree is to render the fact of nullity judicially certain. * * *

"The verdict of the jury in the present case establishes the fact of the bigamous marriage, and the Court of Quarter Sessions, in imposing sentence on the defendant, has authority to declare the bigamous marriage null and void (*Commonwealth v. Walinski,* 18 Dist. R., 504). The fact of a bigamous marriage may be established either in a proceeding in the Common Pleas under the provisions of the Act of April 14, 1859, P. L. 647, or upon an indictment in the Quarter Sessions, and in either case the court having jurisdiction may adjudge the bigamous marriage void. The Act of March 27, 1903, P. L. 102, especially declares that a bigamous marriage shall be void, and there is no valid reason why the Court of Quarter Sessions may not enter an adjudication thereof as an indictment to the sentence imposed on a defendant convicted of bigamy under the act. It is not the decree that renders the marriage a nullity. The only function of the decree is to render the fact of nullity judicially certain (*Newlin's Estate,* 231 Pa., 312)."

It is interesting to note in connection with the problem of permitting a criminal court to enter judgment in civil matters as shown by articles in almost every part of *Il Progresso del Diritto Criminale* that Judge Van Swearingen entered a civil judgment in a criminal procedure. JOHN LISLE.

STATUTORY RAPE

Misconduct of Jury. I call your attention to the case of *State of Kansas v. Charles P. Warner,* 93 Kansas, 378, decided November 14, 1914, as a good example of the way that Kansas' Supreme Court avoids undoing all the work of a trial court in a criminal case in order to correct an error less than the whole. Warner was convicted in Clay County District Court of statutory rape (as the term is commonly used for illicit sexual relations with a female person under the age of legal consent, as distinguished from forcible ravishment). Upon motion for new trial, among other points presented was the question of misconduct of the jury which was alleged to have discussed and considered why the defendant did not take the stand in his own behalf. The trial court refused to permit testimony to this end. The Supreme Court after examining all specifications of error, concluded that none appeared, but that the trial court shall have heard and considered testimony as to the alleged misconduct of the jury. It therefore directed the case remanded for reconsidera-

tion by the trial court of the question of misconduct, but in all other respects sustained the lower court, the jury's verdict and the court's sentence. In the syllabus, which in Kansas is the law of the case, the court said: "Where a verdict of guilty is rendered without any materially erroneous ruling having been made by the court, but upon a motion for a new trial competent evidence upon a question of misconduct of the jury is erroneously rejected, it is not necessary that a new trial of the guilt or innocence of the defendant should be ordered by this court, but the cause may be remanded with directions that the proceedings shall be resumed at the point where the error was committed." In the opinion the court said: "We do not decide that any of the jurors were guilty of misconduct, but merely that the defendant has not had a full hearing upon the question whether or not such was the case. This error can be corrected by placing the matter before the District Court in the same condition as when the ruling was made, so that it may be corrected, and further proceedings taken according to the result then reached. (See *State v. Tyree,* 70 Kansas 203, 207.) The sentence wil be set aside, and the cause remanded with directions for the court to investigate the question of the alleged misconduct of the jury, in the light of all available competent evidence, and pronounce judgment or grant a new trial according to the decision that shall be reached in this matter."

TESTIMONY.

Incompetency of Husband and Wife. The Supreme Court of Kansas, at its December session, came out squarely, though foreshadowing a similar course heretofore, and decided that the provisions of the civil code as to the incompetency of husband or wife to testify against the other do not apply in criminal cases, and that the provision of the criminal code, Section 215, which says that no one shall be rendered incompetent to testify in a criminal case by reason of being the husband or wife of the accused, removes the only objection to the admissibility of such evidence.

JUDGE J. C. RUPPENTHAL, Russell, Kan.

ABATEMENT OF HOUSES OF ILL-FAME.

State v Gilbert, Minn., 147 N. W. 953. *Right to Jury Trial.* A statute authorized proceedings in an equity court to enjoin the maintenance of houses of all-fame. Personal property therein was to be sold and the proceeds paid to the county treasurer except where the owner proved innocence of knowledge that it had been used in violation of the statute. The house was to be closed for one year. "A penalty of $300" was to be imposed "as a tax upon the property and against the person" of the owner or agent which should be a lien upon the land. It was objected that these provisions were penal, so that the legislature could not dispense with trial by jury, by giving equity jurisdiction to enforce them. Held that independently of the statute equity has jurisdiction to abate nuisances, and the legislature has power to enlarge that jurisdiction. The purpose of the act is clearly "repression of the evil, to be worked out by equitable attack upon the property of those engaged in or abetting it and not punishment of the offenders by the infliction of a personal penalty," hence is is a proceeding to abate a nuisance and not to punish a crime. While the act speaks of the imposition of a "penalty" of $300, the contest clearly indicates that it is treated as a tax. Such a tax may be legally imposed as a deterrent without being technical penalty. Hence the statute is constitutional and the defendant not entitled to a jury trial.

BRIBERY.

People v. Peters, Ill., 106 N. E. 513. *Necessity of Acceptance of Bribe for Completed Offense.* Under Crim. Code Sec. 31, declaring that whoever gives any money or other bribe to any state's attorney, with intent to influence his action on any matter which may be brought before him in his official capacity, or to exercise his powers otherwise than as required by law, shall be guilty of bribery, and in view of Sec. 32, imposing a fine upon any one attempting to bribe any state's attorney as set out in the preceding section, the giving and the receiving of the bribe with corrupt intent are essential to the offense of bribery; and hence where the state's attorney took an offered bribe without corrupt intent and in order to convict the party receiving it, there was no acceptance, and hence the offender was not guilty of the offense of bribery.

BRIEFS.

People v Willett, 149 N. Y. Supp. 348. *Improper Language.* Where the district attorney's brief on appeal, in a criminal case, characterized the conduct of the justice of the Supreme Court, who granted a certificate of reasonable doubt as "intellectual inertia," "unmitigated unthinking," and "plain blundering," followed by expressions which could only be interpreted as charging judicial insincerity and duplicity, the language was contemptuous, and the brief should be stricken from the files. JENKS, P. J., Dissenting.

BURGLARY.

Lawson v. Com., Ky. App., 169 S. W. 587. *Breaking Out.* The defendant was indicted and convicted under a statute providing for punishment "If any person * * * shall feloniously break any dwelling house and feloniously take away anything of value * * *." Another section provided that statutes in derogation of the common law should be liberally construed with a view to promote their operation. The evidence indicated that the defendant enterd a dwelling house through a window, stole flour and lard, unfastened the rear door of the house and carried the stolen goods out through that door, re-entered the house, fastened the rear door and left the house through the open window. The defendant appealed on the ground that the court erred in refusing to direct and acquittal because the proof failed to show the accused had broken into the house. Held that the opening of the rear door was a breaking. The statute did not require that the breaking precede the theft. The defendant had stolen the goods and broken out of the house. Hence the court did not err in refusing to direct an acquittal.

CONSTITUTIONAL LAW.

Commonwealth v Karvonen, Mass. 106 N. E. 556. *Validity of Statute Forbidding Use of Red Flags in Parades.* As a "red flag" is well recognized as a revolutionary and terroristic emblem, Stat. 1913, c. 678, sec. 2, prohibiting the carrying of red or black flags in parade, is not bad as unlawfully depriving persons of their liberty: the purpose of the enactment being to prevent parades which would provoke turbulence, which is a legitimate regulation of personal liberty.

CRIMINAL PROCESS AGAINST CORPORATION.

State v. Taylor, S. Dak., 147 N. W. 72. *Summons.* A code of criminal procedure provided for the issuance of summons to bring a corporation before a magistrate for preliminary hearing upon a criminal charge, but contained no

provision for process against a corporation upon an indictment or information. It provided that in matters not covered by the code the practice should be in accordance with the common law. The penal code applied to corporations as well as to natural persons. A corporation was indicted, and a writ of summons issued. On the return day it appeared specially and objected to further proceedings on the ground that the statute did not authorize the issuance of a summons upon the indictment and hence the court had no jurisdiction over the defendant. Held that the maxim *"expressio unius, exclusio alterius"* does not apply as the legislature has wholly failed to provide a method of bringing a corporation into court for trial upon an indictment or information. The common law process by distringas being obsolete, service of summons was valid to require the corporation to answer the indictment and the court thereby acquired jurisdiction of the defendant. *People v Equitable Gas Light Company,* 5 N. Y. Supp., which held the other way, was overruled.

DRUNKENNESS.

United States v LeClair. Criminal Cause 100, United States Court for China. Nov. 2, 1914. *Effect of Voluntary Use of Cocaine.* By the prevailing rule mental aberration, produced by the voluntary use of cocaine is treated as affecting criminal responsibility in the same way as that resulting from the similar use of intoxicating liquors, i. e., the crime committed under such circumstances is not excused, but it is classified as of lower degree and the punishment is reduced accordingly.

ERROR WITHOUT PREJUDICE.

Raoul v City of Atlanta, Ga. App., 82 S. E. 763. *Guilt Admitted.* Defendant was convicted in the recorder's court of selling liquor illegally. He applied to the Superior Court for a writ of certiorari, which was refused, and he brought error. At the trial he admitted that he was secretary and treasurer of the Owls' Club, that the club sold liquor illegally, and that he received as compensation for his services to the club ten per cent of all its receipts, including those from such sales. He denied that he bought the liquor kept at the club or that he ever made any sales. Held that on his own statement he was an accessory to the violation of the ordinance, so the certiorari should not have been issued even though illegal evidence was admitted against him at the trial and other errors committed by the recorder. "If the only possible legal result has been reached, the judgment of the trial judge will not be reversed for the purpose of allowing the case to be heard again, that the same result may be brought about more technically."

EVIDENCE.

State v. Lasecki, Ohio, 106 N. E. 660. *Res Gestae.* The exclamation of a boy, four years of age that "the bums killed pa with a broomstick," which was made from 10 to 30 seconds after a fatal assault upon his father, made in the boy's presence, is competent evidence to go to the jury as explanatory and illustrative of the manner and means by which the father was assaulted. The utterance of the boy under such circumstances, made at the earliest opportunity to make an outcry in the presence and hearing of others, was the spontaneous and impulsive language of the situation, free from any subterfuge, artifice or motive to fabricate. Its weight, however, is purely a question for the jury.

People v. Walter, 149 N. Y. Supp. 365. *Effect of Stipulation by Joint Defendants.* Where defendant and C. were jointly tried with their consent for an offense against the franchise, and at the beginning of the trial it was stipulated that all testimony offered in behalf of either defendant and received without objection should inure to the benefit of both, the converse was equally true, and hence, where a witness gave certain testimony that created an inference favorable to C., proof in rebuttal that such testimony was false, and showing that the fact tended to an incriminatory inference, was admissible against accused as well. Jenks, P. J., and Carr, J., dissenting.

FALSE PRETENSES.

State v. Foxton, Ia., 147 N. W. 347. *Drawing Check Without Funds.* The defendant was convicted of cheating by false pretense. He asked a friend to identify him at a bank where the friend lived so that it would cash a check on his home bank. The friend introduced him to the assistant cashier, who asked if the friend would endorse the check. Defendant then drew a check upon his home bank, payable to the friend's order. The friend endorsed it and the bank, at which they then were, paid the defendant the cash in the friend's presence. The defendant did not say whether he had money in the bank on which the check was drawn or whether the check would be paid on presentation. The check was dishonored and the friend was forced to repay the amount to the bank. The defendant never had any money in his home bank on which he had a right to draw checks and had no reason to believe that the check would be paid by that bank. After defendant was arrested he repaid the amount of the check to the friend. Held that the mere making and delivery of the check, to induce the payment of the money, is an assertion and pretense that the drawer has, at the time, money or credit at the bank on which the check is drawn and that the check will be paid upon presentation. Hence the defendant obtained the money from his friend by a false pretense.

FORFEITURE OF PROPERTY USED ILLEGALLY.

State v. Gilbert, Minn., 147 N. W. 953. *Due Process of Law.* A statute giving courts of equity jurisdiction to abate houses of ill-fame, directs the removal of all movable personal property and the sale of such as belongs to defendants notified or appearing in the suit, unless the owners appear and claim the same within ten days after the order of abatement is made and prove to the satisfaction of the court their innocence of knowledge of said use and of their inability to have acquired such knowledge by reasonable care and diligence; every defendant being presumed to have known the general reports of the place. If their innocence is thus established, the property shall be delivered to them, but otherwise sold. Held that as the statute prescribes notice to everyone and makes provision for a full hearing before final judgment upon the matters involved, it does not authorize property to be taken without due process of law. The provisions making lack of reasonable care or diligence equivalent to notice of the use to which the property is being put is valid, for ignorance due to neglect is the equivalent of notice. Hence the provision is constitutional.

FORMER JEOPARDY.

People ex rel. Bullock v. Warden of City Prison, 150 N. Y. Supp. 24. *Use of Writ of Habeas Corpus in Place of Plea of Former Jeopardy.* Where

relator was indicted for manslaughter, and the jury disagreed, the Supreme Court will not, where the prosecution for manslaughter was dismissed and relator reindicted for murder in the first degree, liberate him on ***habeas corpus,*** even though his first trial constituted former jeopardy, and a conviction for murder in the first degree could not be upheld, for it must be presumed that the County Court, which has jurisdiction of the proceedings, will grant relator proper relief. Relator's first trial constituted former jeopardy, within the Federal and State Constitutions, prohibiting the putting of a person in jeopardy twice for the same offense; for the state having proceeded to trial and required the defendant to make his defense against a charge of one degree of homocide, cannot thereafter dismiss that prosecution and indict for a higher degree, even though, under Code Cr. Proc., Sec. 400, authorizing the trial judge to dismiss the charge and order a resubmission of the case to the grand jury, where the testimony shows a higher offense than that charged, it might have secured a dismissal and reindictment before accused had made his defense.

HIGHWAYS.

Southern Ry. Co. v. State, Tenn., 169 S. W. 1173. *Obstruction Caused by Change of Grade.* In 1887 a railroad trestle was lawfully built over a public highway. It did not obstruct travel. The town in which it was located was incorporated in 1903, and some time thereafter it raised the grade of the road under the trestle about two or two and one-half feet. In consequence, loads of hay, fodder, and vehicles similarly loaded could not pass under the trestle. Defendant then owned the trestle. The town did not order defendant to raise it. Defendant was indicted and convicted of obstructing a public road. The court said that the town had power to change the grade of the street, and could have required the railroad company to reconstruct its crossing to conform to the change, but held that as no such order had been made the railroad company was not criminally liable because of the obstruction. When one's property is, by the act of other parties over whom he has no control, made the instrumentality of a nuisance, the act of those parties is the proximate cause, and the innocent owner of the property is not responsible. It would seem to follow from the argument that the town and its officers might be criminally liable for failure to have the obstruction removed.

INDETERMINATE SENTENCE.

Coleman v. Com., Ky. App., 169 S. W. 595. *Change of Law.* The indeterminate sentence law of 1910 provided that upon conviction of felony the court should sentence the defendant, fixing as the minimum and maximum limits of the term the corresponding limits provided by the statutes. In 1914 this law was changed, the new act providing that the jury should render a verdict fixing an indefinite term, the minimum of which should not be less and the maximum not greater than the minimum and maximum punishment prescribed by the statute. After the second act took effect, the defendant was tried and convicted for a crime committed in 1913, and was sentenced by the court in accordance with the act of 1910. The defendant appealed on the ground that the length of the term of imprisonment should have been fixed by the jury as provided by the act of 1914, under a statute providing that if any punishment be mitigated by a provision of a new law, such a provision may by the consent of the party affected be applied to any judgment pronounced after the new law takes effect. Held that, under the act of 1910,

the prisoner would have the right of applying for a discharge when he had served the minimum term prescribed by the statute. Under the act of 1914, the jury could fix no shorter term, while it could fix a longer minimum. Thus the act of 1914 did not certainly mitigate the punishment. Furthermore, the act of 1914 did not apply unless the defendant consented on the record to have the punishment fixed under it, and he had not done so. Hence the trial court was correct in imposing sentence under the act of 1910. The conviction was affirmed.

Woods v. State, Tenn., 169 S. W. 558. *Constitutionality.* Under the statutes of Tennessee prior to the enactment of the Indeterminate Sentence Law, the jury, when they convicted, fixed the length of the term of imprisonment. Under the new law the judge imposed sentence that the term be not less than the minimum nor more than the maximum terms provided by the statute under which the conviction was had. The defendant was convicted of a crime committed after the new law took effect, but the verdict of the jury fixed his term of imprisonment at five years. The judge disregarded the term prescribed by the jury and sentenced the defendant to not less than three nor more than ten years in the penitentiary, pursuant to the statutes. The defendant appealed on the ground that the new law was unconstitutional. Held (1) that the act does not impair the right of trial by jury, as the right to have the jury assess the punishment was not a part of the right of trial by jury at common law. (2) It does not deprive defendant of liberty without due process of law, as the law is general, applying to a definite and reasonable class of cases, and it deprives no man of his liberty unless he has been duly found guilty by the verdict of a jury. (3) It does not confer judicial powers upon administrative officers, in violation of the constitutional provision keeping the legislative, judicial and executive departments distinct. The power conferred upon the board of prison commissioners to grant a parole after the expiration of the minimum term fixed by law is discretionary, but the exercise of discretion is not restricted to judicial officers; many administrative officers exercise discretion. There is no litigation between parties to be decided by the commissioners; their decision deprives no one of any legal right, nor does it transfer any property or right from one person to another. Further, their discretion is not unlimited, but the legislature doubtless intended that it should be controlled by the same principles as were laid down in the act as conditions for final discharge. The parole leaves the prisoner in the custody of the board, and subject to reimprisonment on its order. (4) It does not delegate legislative authority. The statute under which the conviction is had fixes the maximum term of imprisonment, subject to diminution at the discretion of the board, after the minimum term prescribed by that statute shall have been served. This is no more a legislative act than was the verdict of the jury which, under the prior statute, fixed the length of the term. It is much like the discretion given to prison officials under good-time statutes to decide whether the prisoner's conduct has entitled him to the full reduction of time for good conduct. It is now generally agreed that reformation is the object of imprisonment. This can be accomplished only by restraint, observation, guidance, and protection from imposition. Neither the courts, the legislature nor the governor could exercise the necessary authority. The powers are neither judicial, legislative, nor executive in the sense in which those terms

are used in constitutional limitations, but they "belong to that great residuum of governmental authority, the police power, to be made effective, as is often the case, through administrative agencies." (5) It does not trench upon the governor's pardoning power. When the board is satisfied that a paroled prisoner has become law-abiding, it may recommend his discharge to the governor, who may then discharge him. This is not a pardon, as the rights of citizenship are not thereby restored. Hence the judgment of the trial court was affirmed.

INDICTMENT AND INFORMATION.

Lee v. State, Ark., 169 S. W. 963. *Variance in Unnecessary Description.* The defendant was convicted under an indictment which charged that she enticed a female under the age of sixteen years to become an inmate of a house of prostitution, "Said home then and there being situated on Lake Street, in the city of Paragould, Green County, Arkansas." The proof was that the house was not on Lake Street, but upon a short street in that vicinity. Held that the offense was of a local character. The indictment would have been sufficient had it charged only that the house was in Paragould. But since the pleader alleged the location upon a particular street, that allegation became descriptive of the offense, and material, and should have been proved as charged. Hence the variance was fatal, the judgment was reversed, and the case remanded for a new trial.

Timmons v. State, Ga. App., 82 S. E. 378. *Variance.* An indictment for stealing a cow stated the color of the cow. At the trial the witnesses disagreed as to her color, but there was some evidence that substantially conformed to the description in the indictment. The defendant was convicted. Held that as the jury could believe the witnesses whose testimony agreed with the description in the indictment, and disbelieve the others, there was no fatal variance between the allegation and the proof. The conviction was affirmed.

Rutherford v. State, Tex. Cr. App., 169 S. W. 1157. *Clerical Error.* Defendant was convicted of pursuing the occupation of itinerant physician without having paid the statutory tax. The indictment as found by the grand jury charged that defendant pursued the occupation of "physicial." Defendant moved to quash, on the ground that no such occupation as "physicial" was taxed. The trial court ordered the clerk to change the "l" to "n," and denied the motion to quash. Held error. The word was a matter of substance in the offense charged and not a mere matter of form. An indictment cannot be amended in matter of substance. "Had the trial court not undertaken to change the wording of the indictment, the whole context might have been sufficient, notwithstanding this mistake in spelling the word "physician," but we cannot countenance the alteration of indictments in matters of substance after they have been returned into court." The judgment was reversed and the prosecution ordered dismissed.

State v. Foxton, Ia., 147 N. W. 347. *Amendment.* A statute provided that the county attorney might before or during the trial amend the indictment to correct errors as to matters of form, or in the name of any person, or the description of any person or thing, or in the allegation concerning the ownership of property; but such amendment should not prejudice the substantial rights of the defendant or charge him with a different crime or a

different degree of crime than that already charged. The indictment charged that by a specified false pretense the defendant induced one Dickinson "by said false and fraudulent practices and representations to part with and pay to the defendant $50.00, and accept from the defendant his check therefor." During the trial the court permitted the county attorney to amend the indictment by changing the final period to a comma and adding "by endorsing defendant's check and procuring money thereon from the State Bank of Waverly, Iowa, which was thereupon paid to the defendant." Held the amendment simply stated the manner in which the money was paid to the defendant, as charged in the original indictment. It did not change the nature or degree of the crime nor prejudice the substantial rights of the defendant. Hence it was not error to permit the amendment to be made.

INSANITY.

Commonwealth v. Cooper, Mass., 106 N. E. 545. *Improper Instruction.* In a prosecution for murder, a charge that if defendant had a mental disorder called "constitutional inferiority," and that if the jury find that such disorder carried with it a limited—that is, diminished—degree of responsibility for the act, he could not be found guilty of murder in the first degree, was properly refused, since the defendant, even if abnormally deficient in will power and of retarded mental development, might still be found to have been fully conscious of the criminal character and consequences of his act.

LARCENY.

Morton v. Commonwealth, Ky. App., 166 S. W. 974. *By Trustee.* The defendant was convicted of grand larceny on an indictment charging that he had "* * * taken, stolen, and carried away from the possession of Elizabeth Shelton $525.00 of good and lawful money * * * and one land note of $675.00, * * * the personal property of said Elizabeth Shelton * * * with the felonious intent to convert the same to his own use and to permanently deprive the owner, Elizabeth Shelton, of the same." The proof was that the defendant came from Tennessee and soon became engaged to Miss Shelton. He insisted that she sell her farm in Kentucky, as they would return to live on a farm he claimed to own in Tennessee, and said if she would convey the land to him he could get $200.00 more than she could sell it for and he would at once turn over the proceeds to her. Relying on this advice, she conveyed the farm to him, without consideration, though the deed recited a pretended consideration of $1,100.00. The next day he sold and conveyed the farm for $1,200.00, receiving $525.00 in cash and a note payable to himself for $675.00. He kept both the cash and the note, and tried to sell the latter. He appealed from the conviction on the ground that this evidence did not show grand larceny, but obtaining money and property by false pretenses. Held that the evidence showed that the defendant obtained the deed with the felonious intent to steal and convert the proceeds of the land to his own use. "The several transactions by which this object was accomplished were but part of the trick or device by which she was deprived of the consideration received by appellant from the sale of the land and its conversion effected by him." Relying upon the fraudulent representations, Miss Shelton constituted defendant "her agent to sell the land and immediately pay over to her the proceeds." When he received and converted the proceeds he committed grand larceny. "* * * This arrangement having been brought about by his fraudu-

lent procurement and with the felonious intent on his part to steal, carry away and convert to his own use the money and note received by him from the land, he should not be allowed to escape the punishment that will result to him from the verdict of the jury and the judgment of the trial court, upon the false and purely technical ground that he is guilty of a felony other than the one for which he was indicted and convicted. It is evident that under the conveyance the defendant held the land as trustee for Miss Shelton, and when he sold and conveyed the land, as he was authorized to do, the proceeds were a trust fund in his hands for her benefit. She never had legal title to, nor possession of, the proceeds. If there is a statute in Kentucky which makes a trustee, who embezzles the trust fund, guilty of grand larceny, the decision is evidently correct. The case does not indicate that there is any such statute. The court evidently treats it as a case of larceny by trick at common law. But it is novel doctrine at common law that property can be stolen from a person who neither owns nor possesses it. The court was doubtless confused by the contention of the defense that the money and note were obtained by false pretenses, which was equally unsound, as no false pretenses were made to the person from whom the money and note were obtained. The last extract quoted from the opinion of the court seems to go beyond the farthest demands of those advocating the reform of our criminal procedure by eliminating technicalities. The conclusion seems to be that since the defendant has been convicted of one crime, and as the evidence shows he committed some crime, the conviction should be affirmed. No one could reasonably ask greater freedom from technicalities than this.

State v. Beard, S. Dak., 147 N. W. 69. *Proof of the Corpus Delicti.* The defendant was convicted of stealing a horse. The evidence showed that the horse had been in the owner's possession in October, 1912, had not been sold to the defendant nor to anyone else, that no one had been given authority to take and dispose of it, and that it was found in the possession of this defendant in March, 1913. There was no evidence as to the whereabouts of the horse between those dates or as to how it came into the defendant's possession. Held that the evidence did not show a felonious taking by anyone, so that the presumption of guilt arising from the recent possession of stolen property did not arise. Because the *corpus delicto was not proven,* the conviction was reversed.

OBSTRUCTING JUSTICE.

Commonwealth v. Southern Express Co., Ky. App., 169 S. W. 517. *Removing Written Evidence from the Jurisdiction.* An indictment charged that the grand jury being about to investigate violations of the prohibitory law, the defendant, knowing that certain of its books and papers contained evidence of the violation of the law by itself and others, and knowing that such books and papers would be called for and required by the grand jury, caused them to be removed from the county, for the purpose of hindering, obstructing, and preventing such investigation; and thereby obstructing justice. The trial court sustained a demurrer to the indictment and discharged the defendant. The commonwealth appealed. The Appellate Court said that a natural person could not be required to exhibit to the grand jury the contents of his books and papers containing evidence incriminating himself, any more than he could be required to incriminate himself by word of mouth, but when sub-

pœnaed to produce them he must appear in person before the court with the required evidence in his possession and must tender himself and his books and papers for investigation by the court, so that it may determine for itself whether the evidence desired is of an incriminating nature. But it held that the constitutional provision against self-incrimination does not extend to corporations and may not be claimed for it by its officers or agents. The defendant could have been compelled to produce its books and papers by the subpœna *duces tecum ad testificandum,* directed to the agent of the corporation, for possession of the records, or by a subpœna *duces tecum* without the *testificandum* clause directed to the corporation itself and served upon its personal agent. It was immaterial that, when the records were removed, no subpœna had been issued requiring the company to produce them before the grand jury. Records cannot be removed with impunity in anticipation of a subpœna any more than a possible witness can be bribed or intimidated from attending the trial before a subpœna has been served upon him. Hence the removal of the records constituted an obstruction of justice and the judgment of the lower court was reversed.

PARTIES.

United States v. LeClair, Criminal Cause No. 100, U. S. Court for China, Nov. 2, 1914. *Principals in the Second Degree under the New Federal Penal Code.* The common law classification of principals into those of the first and second degrees has not been abolished by the Federal Penal Code, and where defendant was not the actual perpetrator of the abstraction which constitutes the gist of a robbery he must be treated as a principal in the second degree.

People v. Bruno, 149 N. Y. Supp. 321. *Accomplice.* Penal Law Sec. 2354, subd. 1, providing that a person who counterfeits a trade-mark shall be guilty of a misdemeanor, implies that the act shall be done with a fraudulent or criminal intent, and a printer, by printing impressions from plates brought to him by his customer in the ordinary course of business, and delivering the impressions to his customer, could not be regarded as an accomplice, within the law relating to the evidence of accomplices.

People v. Kimmel et al., 150 N. Y. Supp. 311. *Liability of Partnership for Unauthorized Act of Agent in Selling Adulterated Drugs.* Under Public Health Law, Sec. 234, as amended by Laws 1910, Ch. 422, making every proprietor of a pharmacy or drug store responsible for the strength, quality and purity of all drugs sold or disposed by him; Sec. 235, as so amended, making a proprietor liable for violations of that section by his apprentices or unlicensed employees; Sec. 240, subd. 10 and 11, as so amended, making it a misdemeanor for any person to adulterate any drug, knowing or intending that it shall be used, or to sell any adulterated drug, or for any person to violate any provision of that article for which no punishment is imposed; and the further provision of Sec. 240, as amended, that any person violating any provision of that article who is not criminally prosecuted shall forfeit to the people $50.00, that the word "person" in that article shall import both the plural and singular, and include corporations and partnerships, etc., that the act, omission or failure of any officer, agent or person acting within the scope of his authority or employment shall be deemed the act, omission or failure of the corporation or association, and that in case of a violation by a

partnership, association or corporation, every member of the partnership, or association, and the directors and general officers of the corporation and the general manager of each shall be individually liable—the members of a partnership were individually liable for the penalty for the act of their clerk, a registered pharmacist, in wrongfully compounding and delivering an adulterated drug, although they had directed him to obey the law, and although partnerships are not mentioned in the provision relative to the liability of corporations and associations for the acts of their officers and agents, as the purpose of the amendment of 1910 to Section 240 was not to limit the scope of the act but to make it more definite and certain as to corporations and associations. Seabury, J., dissenting.

PLEA.

Canter v. State, Ohio, 106 N. E. 656. *Rejection of Plea of Guilty of Lesser Offense and Admissibility in Evidence.* The tender of a plea of guilty of assault and battery by the accused, upon arraignment under an indictment charging shooting with intent to kill, which tender is rejected by the state, is not a proper subject of record on the journal of the court. Nor is the entry of such a plea, and its rejection by the state, admissible in evidence upon the trial of the accused under the indictment. Wanamaker, J., dissenting.

SENTENCE.

People v. Goodrich, 149 N. Y. Supp. 406. *Power to Suspend Execution.* The Supreme Court, after passing sentence of imprisonment at trial term, has the inherent power at common law to suspend sentence during defendant's good behavior, and to revoke such suspension at a later term and direct that it be executed, and has the same power under Penal Law, Sec. 2188, providing that courts in their discretion may suspend sentence during good behavior in certain cases, in view of Code Cr. Proc., Sec. 487, as amended by Laws 1901, Ch. 372, providing that in certain cases, where the court has ssupended sentence or the execution thereof, the defendant shall be placed in the hands of a probation officer and of Code Cr. Proc., Sec. 483, as amended by laws 1905, Ch. 656, providing that after a plea or verdict of guilty the court, on suspending sentence, may place defendant on probation or suspend sentence of imprisonment, and, as further amended, to allow the court to revoke such provision and pronounce judgment or revoke such suspension of judgment. The suspension of sentence gives the prisoner no vested rights, nor does it in any way conflict with the pardoning power of the executive.

Thompson v. Duehay, Supt. of Prisons of Department of Justice, 217 Fed. 484. *Effect of Commutation on Good Time Allowance.* Under Act of June 25, 1910, Ch. 387, Sec. 1, providing that every prisoner convicted of any offense against the United States and confined in any United States penitentiary or prison for a definite term or terms of over one year, whose record of conduct shows he has observed the rules of the institution, and who has served one-third of the total of the term or terms for which he was sentenced, may be released on parole, and Sec. 10, providing that nothing therein contained shall impair the power of the President to grant a pardon or commutation, or impair or revoke any good time allowance, where sentences to two four-years' imprisonment on each of two counts, to run consecutively, were commuted by the President to run concurrently, the prisoner was eligible to parole

when he had served one-third of the four-year period covered by the concurrent sentences, since the "total of the term or terms" means the total time actually to be served, and the commutation in effect wipes out the judgment and writes a new sentence, and, moreover, any other construction would deny full effect to the action of the President.

VERDICT.

Gordon v. State, Wis., 147 N. W. 998. *Error in Record.* On a trial for felony the jury found a verdict of "guilty" and the foreman orally reported it to the court. By a mistake he had signed the blank verdict of "not guilty." The court discovered this and directed the jury to retire. On returning into court they again gave their verdict as "guilty." By mistake the clerk recorded in the minutes the written verdict of "not guilty." Held that the verdict returned by the jury was the legal verdict, the erroneous entry in the clerk's minutes was without effect, and the conviction was affirmed.

Lamb v. State, Tex. Cr. App., 169 S. W. 1158. *Term Fixed by Average.* A verdict that defendant was guilty of murder fixed his term of imprisonment at thirty years. On motion to set aside the verdict, on the ground that it was a "quotient verdict," the jurors were examined. Their testimony showed that they had agreed upon a conviction and that the ballots cast to fix the term ranged from five to ninety-nine years. After several ballots it was agreed that the terms favored by each should be added and the total divided by twelve. This was done, and the quotient was thirty-two years and six months. A juror then moved that the term be thirty years, and the motion was unanimously carried. One juror testified that it was agreed before the average was taken that they should all be bound by the result, and that it was only because of this agreement that he consented to so long a term. Another said in one part of his testimony that they agreed to be bound by the result, but in another part said he was free to disagree after the average had been found. The rest of the jurors denied any agreement to be bound by the quotient, but said it was taken to ascertain the average opinion of the jury and agreed to by all after the quotient had been obtained. Held that this evidence required the trial judge to find that there was no prior agreement to be bound by the quotient, and that a verdict so found without such prior agreement was valid. The conviction was affirmed.